Message Text

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TAGS: EEC, ETRD, SCUL
SUBJECT: US/EC DISCUSSION OF THE FLORENCE AGREEMENT

REFS: A) STATE 165979; B) STATE 164165

1. SUMMARY: DISCUSSION BETWEEN THE US AND THE EC COMMISSION REVEALED OPPOSITE POINTS OF VIEW ON THE LEGALITY AND THE EFFECTS OF THE NEW EC REGULATIONS ON THE TERRITORIAL APPLICATION OF ANNEX D AND ANNEX A(V)(VI) AND (VIII) OF THE FLORENCE AGREEMENT. THE COMMISSION FURNISHED SOME INFORMATION ON THE TIMING OF ITS ADMINISTRATIVE PROCEDURES, BUT WAS UNABLE TO GIVE CRITERIA FOR ITS DECISIONS ON EQUIVALENCY, AVAILABILITY, ETC. END SUMMARY.

2. ON JULY 7 A US DELEGATION (INCLUDING MAURER OF L/ECP AND SEPPA OF COMMERCE) MET WITH EC COMMISSION OFFICIALS (LOERKE OF EXTERNAL AFFAIRS, AUBREE OF CUSTOMS AND AMPHOUX OF LEGAL SERVICES) TO DISCUSS US OBJECTIONS TO THE EC DIRECTIVE EXTENDING THE TERRITORY COVERED BY THE FLORENCE AGREEMENT FROM THE INDIVIDUAL MEMBER STATES TO THE ENTIRE COMMUNITY FOR PURPOSES OF ANNEX D AND ANNEX A(V)(VI) AND (VIII). JOHNSTON
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OPENED THE DISCUSSION BY EXPANDING ON THE FIRST FOUR TALKING

POINTS IN REF B.
HE EXPLAINED THE SCOPE OF US CONCERNS OVER THE RESTRICTIVE EFFECT OF EC REGULATION 1798/75. THIS UNILATERAL REINTERPRETATION OF THE EXISTING AGREEMENT WOULD JEOPARDIZE US ACCEPTANCE OF A NEW PROTOCOL EXPANDING THE AGREEMENT. HE CALLED FOR THE SUSPENSION OF THE REGULATION. MAURER, TALKING FROM THE LEGAL BRIEF, THEN SET OUT AT SOME LENGTH THE LEGAL POSITION OF THE US ON THE ISSUE. HE DEVELOPED THE BACKGROUND TO THE FLORENCE AGREEMENT AND ARGUED THAT THE COMMUNITY'S ACTION AMOUNTED TO A UNILATERAL CHANGE IN THE CLEAR TERMS OF THE FLORENCE AGREEMENT AND CONSEQUENTLY RESULTED IN A VIOLATION OF THE AGREEMENT. FURTHER, SUCH A CHANGE IMPAIRED THE QUID PRO QUO WE HAD ACQUIRED IN THE FLORENCE AGREEMENT AND MIGHT BE CAUSING TRADE DAMAGE OF 40 TO 80 MILLION DOLLARS. HE POINTED OUT THE NON-APPLICABILITY OF SEVERAL EXCULPATORY ARGUMENTS WHICH THE COMMUNITY MIGHT ATTEMPT TO INVOKE TO JUSTIFY ITS ACTIONS. HE EXPLAINED DOCTRINES OF FUNDAMENTAL CHANGE OF CIRCUMSTANCES, SUCCESSION OF STATES, SUPERVENING LEGAL IMPOSSIBILITY, STATE PRACTICE GIVING RISE TO A RULE OF CUSTOMARY INTERNATIONAL LAW, ETC. MAURER POINTED TO GATT, THE HARMONIZATION OF CUSTOMS CONVENTION, MULTIFIBER AGREEMENT, TIN AGREEMENT AND COFFEE AGREEMENTS, AS SHOWING THAT NO RULE OF CUSTOMARY INTERNATIONAL LAW ALLOWED, IN THE CASE OF A CUSTOMS UNION, THE REPLACEMENT OF COUNTRY OF IMPORTATION BY TERRITORY OF THE CUSTOMS UNION. SPECIFIC PROVISIONS WERE NEEDED IN AGREEMENTS TO ALLOW APPLICATION TO THE TERRITORY OF THE CUSTOMS UNION AND ADHERENCE OF THE CUSTOMS UNION.

3. THE COMMISSION OFFICIALS GAVE US A NON-PAPER DEFENDING APPLICATION OF THE AGREEMENT TO THE TERRITORY OF THE CUSTOMS UNION AND ELABORATING ON THEIR NEW PROCEDURES (BEING HAND CARRIED TO WASHINGTON). THEIR VERBAL RESPONSE WAS ALONG THE FOLLOWING LINES: A) THEY ARGUED THAT IT WAS INAPPROPRIATE TO CONSIDER THE AGREEMENT AS A COMMERCIAL AGREEMENT SINCE ITS OBJECTIVE WAS CULTURAL. THE NOTION OF A QUID PRO QUO IN TRADE TERMS WAS INCIDENTAL TO THIS MAIN OBJECTIVE. EXPANDING ON THIS POINT, LOERKE OF THE COMMISSION SAID THAT THE AGREEMENT WAS INHERENTLY UNBALANCED BECAUSE THE US IS AN ENORMOUS TERRITORY WITH HIGH TECHNOLOGY AND THE OTHER SIGNATORIES ARE SMALLER COUNTRIES WITH A LIMITED TECHNOLOGY BASE. HE CLAIMED
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THAT THE US PROCESSES SOME 1500 CASES PER YEAR OF DUTY FREE ENTRY UNDER THE FLORENCE AGREEMENT WHEREAS THERE ARE 50-60,000 IN THE EC.
B) LOERKE SEEMED TO BASE HIS LEGAL DEFENSE MAINLY ON THE DOCTRINE OF SUCCESSION OF STATES (ON THE BASIS THAT THE COMMUNITY HAD SUCCEEDED TO CERTAIN SOVEREIGN POWERS OF ITS MEMBER STATES WITHIN A LIMITED SPHERE) TO JUSTIFY THE REPLACEMENT OF TERRITORY OF AN IMPORTING STATE BY TERRITORY OF THE COMMUNITY.

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WHEN QUESTIONED, HE INDICATED THAT HE WAS NOT READY TO SPECIFY
ANY OTHER LEGAL DOCTRINE THAT THE COMMUNITY WAS RELYING ON.
C) AMPHOUX APPEARED TO BE RELYING ON THE INVOCATION OF CUSTO-
MARY INTERNATIONAL LAW AS REGARDS THE REPLACEMENT, BY A CUSTOMS
UNION OF A COUNTRY OF IMPORTATION. HE MAINTAINED THAT SPECIFIC
PROVISIONS THAT HAD BEEN WRITTEN INTO OTHER AGREEMENTS SPECI-
FYING COMMUNITY TERRITORY AND ADHERENCE BY THE EC WERE PUT IN
MERELY TO AVOID DIFFICULTIES.
D) THEY ALSO ARGUED THAT THE PRECEDENT OF THE BELGIAN-
LUXEMBOURG CUSTOMS UNION (BLEU) AND THE BENELUX HAD NOT BEEN
CONTESTED IN APPLICATION OF THE FLORENCE AGREEMENT.

4. MAURER COUNTERED ARGUMENTS OF COMMUNITY SPOKESMEN AS FOLLOWS,
GEARED TO ABOVE:
A) THE FLORENCE AGREEMENT AS WELL AS BEING A CULTURAL AGREE-
MENT WAS ALSO A TRADE AGREEMENT, AS WITNESSED BY INCLUSION OF
DOMESTIC INJURY ESCAPE CLAUSE, TRADE EXPERTS' PARTICIPATION IN
NEGOTIATIONS IN 1950, AND THE CONSIDERATION OF TRADE PROS
AND CONS IN OUR ADHERENCE TO THE AGREEMENT. THEREFORE WE COULD
NOT ACCEPT AS IRRELEVANT IMPAIRMENT OF TRADE CAUSED BY UNILA-
TERAL ACTION OF THE COMMUNITY. (MOTIVATION OF THE COMMUNITY
IN MAKING THEIR ARGUMENT ON THIS POINT WAS NOT ENTIRELY CLEAR,
BUT WE CONJECTURE THAT THEY CONSIDERED THAT IF THEY ADMITTED
IT WAS A TRADE AGREEMENT THEY WOULD BE OBLIGATED, AS IN GATT,
TO PROVIDE COMPENSATION FOR UNILATERAL ACTION IN IMPAIRING
CONCESSIONS.)
B) AS REGARDS UTILIZATION OF THE DOCTRINE OF SUCCESSION OF
STATES, MAURER QUOTED WALDOCK, RAPPORTEUR OF CODIFICATION
OF LAW OF SUCCESSION OF STATES, THAT EUROPEAN COMMUNITIES,
THOUGH A HYBRID INSTITUTION, COULD NOT BE DESCRIBED AS A
SUCCESSION STATE.
C) ON THE POINT OF DUSTOMARY INTERNATIONAL LAW MAURER STATED
THAT INSERTION OF PARTICULAR PROVISIONS IN THE INTERNATIONAL
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CONVENTIONS REFERRED TO WAS NOT A CONVENIENCE BUT A NECESSARY
CONDITION. WITHOUT SUCH INSERTION THE OTHER COUNTRIES PARTI-
CIPATING IN THOSE CONVENTIONS WOULD NOT HAVE ADMITTED CUSTOMS
UNION TERRITORIAL APPLICATION, COMMUNITY ADHERENCE ETC.

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D) ON QUESTIONS OF BLEU AND BENELUX PRECEDENT, MAURER WENT OVER THE INTERNATIONAL COURT DECISION IN THE NORTH SEA CONTINENTAL SHELF CASES AND DESCRIBED CRITERIA FOR PRACTICES GIVING RISE TO A RULE OF CUSTOMARY INTERNATIONAL LAW AND STATED THE VIEW THAT SUCH CRITERIA HAD NOT BEEN MET IN THIS CASE.

5. AS THE US SIDE MADE THE TALKING POINTS IN REFTEL B, IT BECAME CLEAR THAT THE COMMISSION WAS NOT PREPARED TO CONSIDER RECISION OF THE EC REGULATIONS. NOR, DESPITE QUESTIONING, DID THEY MAKE AN OFFER OF OFFSETTING OR COMPENSATORY ACTION. WE, ON THE OTHER HAND, REPEATED THAT WE CONSIDERED THAT THIS LEGAL ACTION WAS NOT JUSTIFIED. WE MENTIONED BRIEFLY THAT WE HAD NOT OURSELVES EXAMINED MATTERS BUT THERE WAS POSSIBILITY WHERE SUCH LEGAL ISSUES WERE INVOLVED TO THINK OF RECOURSE TO ARBITRATION, COURT ACTION OR AN ADVISORY OPINION AND REFERRED TO ARTICLE VII OF THE FLORENCE AGREEMENT WHICH LEFT THESE AVENUES AVAILABLE IN ADDITION TO NEGOTIATION OR CONCILLIATION. THIS POINT DREW NO RESPONSES FROM THE COMMUNITY REPRESENTATIVES.

6. AUBREE OF THE COMMISSION EXPLAINED HOW THE NEW REGULATION OPERATES. HE TRIED TO STRESS THAT IT WAS AS SIMPLE AND RAPID AS COULD BE DEVISED, GIVEN THE FACT THAT THE ADMINISTRATION
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OF THE REGULATION WAS IN THE HANDS OF INDIVIDUAL MEMBER STATES. HE POINTED OUT THAT WHEN A REQUEST CAME TO A MEMBER STATE FOR DUTY FREE ENTRY, ITS OFFICIALS COULD BE EXPECTED TO GIVE A RESPONSE WITHIN ONE MONTH OR A MONTH AND A HALF, WHICH WOULD INCLUDE CHECKS WITH COLLEAGUES IN OTHER MEMBER STATES.

IF THERE ARE DISPUTES OR UNCERTAINTY THE MATTER WOULD BE REFERRED TO THE COMMISSION, IN WHICH CASE THE TOTAL TIME LAPSED WOULD BE ABOUT THREE MONTHS. ONLY IN VERY SPECIAL CASES WOULD COMMISSION CONSIDERATION TAKE LONGER THAN SIX WEEKS, ACCORDING TO AUBREE. BEFORE MAKING ITS DECISION THE COMMISSION WOULD CONVOKE MEMBER STATE REPRESENTATIVES TO DISCUSS THE CASE. IF THE COMMISSION DELAYED THE MAXIMUM OF SIX MONTHS THE GOODS WOULD BE ALLOWED IN FREE. BETWEEN JANUARY 1 AND JUNE 15, 1975, OF AN ESTIMATED 25,000 CASES EXAMINED BY MEMBER STATES, ONLY SEVEN HAD BEEN REFERRED TO THE COMMISSION, AND SIX OF THESE INVOLVED A DEFINITION OF SCIENTIFIC INSTRUMENTS; ONLY ONE CONCERNED THE QUESTION OF PRODUCTION IN THE COMMUNITY.

7. SEPPA QUESTIONED AUBREE ABOUT THE QUESTIONNAIRE ON THE APPLICATION OF ANNEX D OF THE AGREEMENT WHICH WAS CIRCULATED BY UNESCO ON SEPTEMBER 31, 1974. SEPPA POINTED OUT THAT FEW DETIALS WERE KNOWN ABOUT THE IMPLEMENTATION OF THE NEW EC REGULATION AND THAT IT WAS VERY IMPORTANT FOR THE US TO KNOW HOW THE EC COUNTRIES WERE APPLYING IT. THE FULL IMPACT OF THE REGULATION COULD ONLY BE MEASURED IF MORE INFORMATION BECAME AVAILABLE. ANSWERS ON THE CRITERIA EMPLOYED IN DETERMINING EQUIVALENCY AND AVAILABILITY WERE CITED AS MORE IMPORTANT TO THE US THAN THE TIME TAKEN IN PROCESSING APPLICATIONS. AUBREE REPLIED THAT THE COMMISSION HAD NOT FILLED OUT THE QUESTIONNAIRE BECAUSE IT HAD NOT BEEN OFFICIALLY SENT TO THE COMMISSION BUT RATHER TO THE MEMBER STATES. THE MEMBER STATES ON THE OTHER HAND HAD NOT FILLED OUT THE FORM BECAUSE THE QUESTIONS INVOLVED AN AREA OF COMMUNITY COMPETENCE. AUBREE RECOGNIZED THE IMPORTANCE THAT WE ATTACHED TO HAVING THE INFORMATION REQUESTED IN THE QUESTIONNAIRE, AND HE PROMISED THAT HE WOULD APPROACH THE MEMBER STATES IN JULY TO TRY TO GET THEM TO AGREE ON JOINT RESPONSES TO THE QUESTIONNAIRE. IF ALL WORKED WELL HE HOPED THAY THEY COULD AGREE ON A RESPONSE PRIOR TO NAIROBI. THE COMMISSION DOES NOT NOW HAVE TRADE DATA AND HE IS NOT SURE IF THE MEMBER STATES HAVE IT. THE BEST TO BE LOOKED FOR WOULD BE JANUARY-JUNE STATISTICS FOR 1975 AND 1976 ON EC IMPORTS OF
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SCIENTIFIC INSTRUMENTS FROM THE US.

8. IN RESPONSE TO A QUESTION FROM SEPPA ON THE METHODOLOGY FOR DETERMINING SCIENTIFIC EQUIVALENCE AND AVAILABILITY OF INSTRUMENTS, AUBREE REPLIED THAT EACH MEMBER STATE APPLIES ITS OWN INTERPRETATION. THE COMMISSION HAS NOT TRIED TO IMPOSE UPON THE MEMBER STATES ANY UNIFORM RULES REGARDING METHODS OF INTERPRETATION. THERE ARE MECHANISMS WITHIN THE DIRECTIVE UNDER WHICH MEMBER STATES' INTERPRETATIONS ON EQUIVALENCE AND AVAILABILITY COULD BE CHALLENGED BUT SO FAR THIS HAS NOT BEEN THE CASE. MEMBER STATES WOULD FILE SIX MONTH REPORTS ON PRODUCTS ADMITTED VALUE ABOVE 2,000 UNITS OF ACCOUNT, (APPROXI-

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MATELY $2,400) AND THESE WOULD HELP BRING ABOUT COMMON PRACTICES. THIS WAS A REPORTING PROCEDURE AND WOULD NOT AFFECT OR REVERSE DECISIONS ALREADY MADE. HOWEVER, SUCH LISTS WOULD BE DISTRIBUTED TO ALL MEMBER STATES AND WHERE DISAGREEMENTS ON INTERPRETATION AROSE, THE APPLICATIONS INVOLVED WOULD BE REVIEWED AND A DECISION MADE ON HOW TO DEAL WITH SUBSEQUENT IMPORTS OF THE PRODUCTS. SINCE THE FIRST LISTS HAVE NOT BEEN SUPPLIED UNDER THIS PROCEDURE, AUBREE WAS NOT ABLE TO DESCRIBE IN FURTHER DETAIL THE MECHANICS OF THE PROCEDURE OR ITS POSSIBLE AFFECT. AUBREE WAS ALSO ASKED IF INSTITUTIONS COULD REQUEST A DETERMINATION ON WHETHER OR NOT INSTRUMENTS WOULD QUALIFY FOR DUTY FREE ENTRY PRIOR TO ACTUAL PURCHASE. SUBREE APPLIED IN THE AFFIRMATIVE. CURRENT MEMBER STATE COURT APPEAL PROCESSES REMAIN IN EFFECT, AND IN ADDITION IT WOULD ALSO BE POSSIBLE TO APPEAL TO THE EUROPEAN COURT ON CASES INVOLVING THE COMMISSION.

9. IN REGARD TO THE NEW PROTOCL BEING CONSIDERED, AUBREE SAW NO POSSIBILITY OF MEMBER STATE/COMMUNITY ADHERENCE UNLESS THE PROTOCOL RECOGNIZED THAT THE COMMUNITY AND NOT THE MEMBER STATES WAS THE COMPETENT BODY FOR THESE MATTERS. AUBREE EXPRESSED THE OPINION THAT THE FLORENCE AGREEMENT WAS IN SERIOUS NEED OF REVISION FOR SEVERAL REASONS. IF DID NOT YET HAVE CLEAR RPOVISIONS ON CUSTOMS UNIONS. IT DID NOT RECOGNIZE THE SPECIAL SITUATION OF LDC'S AND, MOST SERIOUS OF ALL, THERE WAS NO GENERAL DEFINITIONAL AGREEMENT OR CONSENSUS ON PRODUCTS COVERED, ON EQUIVALENCY OR AVAILABILITY. THIS WAS NOT AN EASY TASK. THE COMMUNITY MEMBER STATES THEMSELVES SO FAR HAVE NO SPECIFIC CRITERIA ON EQUIVALANCE OR AVAILABILITY AND MUST REACT BY "COMMON SENSE" IN MEETINGS ON MEMBER EXPERTS TO SETTLE ANY LIMITED OFFICIAL USE

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ISSUES THAT ARISE. A UNESCO MEETING WAS NEEDED TO BETTER DEFINE THE AMBIGUOUS ANNEX D PROVISIONS AND THE EC AND US SHOULD WORK TOWARD ENCOURAGING SUCH A MEETING. SEPPA STATED THAT THE PURPOSE OF THE UNESCO QUESTIONNAIRE ADVOCATED IN 1973 BY USG WAS TO ENCOURAGE A MOVE TOWARD CLARIFICATION OF INTERPRETATION UNDER THE AGREEMENT.

10. LOERKE ASKED SEVERAL QUESTIONS ON US IMPLEMENTATION OF ANNEX D AND INQUIRED ABOUT TRADE STATISTICS FOR IMPORTS UNDER ANNEX D. SEPPA ADVISED DATA WERE INCLUDED IN THE US REPORT TO UNESCO, A COPY OF WHICH WAS SUPPLIED TO EC OFFICIALS IN MARCH. HE DESCRIBED METHODS FOR DETERMINING DOMESTIC AVAILABILITY AND STATED THAT US STATES HAD NO ROLE IN ADMINISTRATION OF THE AGREEMENT. THE US HAS NOTHING TO HIDE RELATIVE TO IMPLEMENTATION OF ANNEX D. IT CONSIDERS ITS IMPLEMENTATION FULLY CONSISTENT WITH THE SPIRIT AND TERMS OF THE FLORENCE AGREEMENT. MOREOVER, SEPPA INDICATED US WILLINGNESS TO RESPOND TO ANY QUESTIONS OR PROBLEMS THE EC HAD WITH RESPECT TO US PROCEDURES.

11. WE FINALLY INDICATED THAT WE HAD ASKED FOR THE MEETING
TO EXCHANGE VIEWS ON LEGALITY AND TRADE IMPACT, THAT A USEFUL
EXPLORATORY EXCHANGE HAD TAKEN PLACE AND THAT IT MIGHT BE
DESIRABLE TO HAVE ADDITIONAL MEETINGS SOME TIME IN THE FUTURE.
THE COMMISSION OFFICIALS DID EXPRESS WILLINGNESS IN PRINCIPLE
TO HAVE A FURTHER EXCHANGE OF INFORMATION WITH THE US, EITHER
THROUGH USEC OR THROUGH MEETINGS BETWEEN THE EXPERTS. HOWEVER,
NO MEETING WAS SET UP OR EVEN FIRMLY AGREED UPON.HINTON

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